

STATE OF MICHIGAN
COURT OF APPEALS

ROBERTA L. HILL,

Plaintiff-Appellee,

v

HOWARD B. HILL,

Defendant-Appellant.

UNPUBLISHED

January 30, 1998

Nos. 194551 & 201133

Wayne Circuit Court

LC No. 93-329838-DM

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

In Docket No. 194551, defendant appeals as of right the March 7, 1996, amended judgment of divorce entered in the Wayne Circuit Court. In Docket No. 201133, defendant appeals by leave granted from the January 21, 1997, order of the Wayne Circuit Court denying his motion for modification of the amended judgment of divorce with respect to his spousal support and child support obligations. In Docket No. 194551, we affirm. In Docket No. 201133, we affirm in part, reverse in part, and remand.

Docket No. 194551

Defendant first argues that the trial court erred in awarding plaintiff alimony in the amount of \$2,000 per month for three years, and in ordering defendant to pay plaintiff's educational and medical expenses for three years. We disagree.

When reviewing an alimony award, this Court must first review the trial court's findings of fact under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). If the findings are upheld, this Court must then decide whether the dispositive ruling was fair and equitable in light of those facts. *Id.* at 151-152. The dispositional ruling is discretionary and should be upheld unless this Court is left with a definite and firm conviction that the ruling was inequitable. *Id.* at 152.

We find that the trial court's award of alimony, educational, and medical expenses to plaintiff for three years was fair and equitable. A court has the discretion to award alimony under MCL 552.23; MSA 25.103, "as it considers just and reasonable" in light of all the circumstances. *Ianitelli v Ianitelli*,

199 Mich App 641, 642-643; 502 NW2d 691 (1993). The main objective of alimony is to balance the incomes and needs of the parties in a way which will not impoverish either party, *Ackerman v Ackerman*, 197 Mich App 300, 302; 495 NW2d 173 (1992), and is to be based on what is just and reasonable under the circumstances of the case. *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993). The factors to be considered include 1) the past relations and conduct of the parties, 2) the length of the marriage, 3) the abilities of the parties to work, 4) the source and amount of property awarded to the parties, 5) the parties' ages, 6) the abilities of the parties to pay alimony, 7) the present situation of the parties, 8) the needs of the parties, 9) the parties' health, 10) the prior standard of living of the parties and whether either is responsible for the support of others, 11) contributions of the parties to the joint estate, 12) a party's fault in causing the divorce, 13) the effect of cohabitation on a party's financial status, and 14) general principles of equity. *Ianitelli, supra* at 643; *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).

Defendant argues that the trial court clearly erred in finding that he had the ability to earn "much more" than the salary he was earning at the time of trial. We disagree. At the time of trial, defendant had been working as an attorney for over twenty-four years, and had a history of high-paying jobs. Although defendant's attempt to open his own law practice was not successful, at the time of trial he was employed at a law firm at a starting salary of \$120,000. Based on defendant's employment history, we do not believe that the trial court's finding that defendant had the ability to earn more than \$120,000 per year was clearly erroneous.

Defendant next argues that the trial court erred in its evaluation of the parties' financial situations and in its evaluation of defendant's ability to pay alimony after the allocation of debt in the property division. We disagree. It is clear from the trial court's findings of fact and from the transcript of the hearing on defendant's motion for amendment of the judgment of divorce that the trial court carefully considered defendant's income and expenses when making its spousal support determination. While plaintiff was saddled with significant debt, he was earning income of \$120,000 per year, and, as noted above, has the potential to earn more. In addition, defendant's financial situation was only one factor for the trial court to consider in making its spousal support determination. *Ianitelli, supra* at 643; *Thames, supra* at 308. It is also clear from the record that plaintiff was in need of financial support. Plaintiff, who was forty-five years old at the time of trial, had almost no experience working outside the home. She testified that she had no employable skills at the time of trial, but that she was enrolled in prerequisite classes, hoping to enter a physician's assistant program. Plaintiff further testified that she had no money to pay for her education and that she had no means of supporting herself while attending school full time. If plaintiff is to be able to support herself in the future, she is clearly in need of spousal support and tuition expenses at the present time. Therefore, we find the trial court's award of spousal support, tuition, and medical expenses for three years to be fair and equitable.

Defendant next argues that the trial court erred in awarding plaintiff \$20,000 in attorney fees. We disagree. In a divorce action, attorney fees are awarded only as necessary to enable a party to prosecute or defend a suit. MCR 3.206(C)(2); *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). If the court's award of alimony and property leaves parties with comparable assets and incomes, an award of attorney fees is not appropriate. *Id.* at 299. A trial court's decision

regarding an award of attorney fees in a divorce action will not be reversed absent an abuse of discretion. *Id.* at 298.

Defendant argues that the trial court abused its discretion in awarding attorney fees to plaintiff because plaintiff needlessly prolonged the litigation by making unfounded allegations against him, which greatly increased both defendant's and plaintiff's attorney fees and adversely affected defendant's ability to earn a living. When awarding attorney fees in a divorce action, the trial court may consider the fact that a party's spurious claims and allegations prolonged the proceedings. *Thames, supra* at 310. However, defendant presented no evidence that plaintiff initiated the allegations against him. Indeed, plaintiff adamantly denied initiating the allegations. The trial court apparently concluded that plaintiff was not the source of the allegations. Because this factual finding is not clearly erroneous, we will defer to the trial court. Accordingly, these allegations provide no basis for denying plaintiff attorney fees.

Defendant also argues that the trial court's award of attorney fees was an abuse of discretion because the record did not support a finding that defendant had the ability to pay the fees. We disagree. There is no dispute that, at the time of trial, plaintiff's income potential was far below that of defendant.¹ Indeed, it appears that plaintiff did not anticipate any substantial income until she completed two more years of higher education. By comparison, although defendant had certain other debts to pay, he was an experienced attorney earning \$120,000 per year. In addition, plaintiff testified at trial that she had already paid her attorney \$7,500, and that she owed a balance of \$23,716 at the time of trial. Therefore, plaintiff was held responsible for at least \$11,216 of her own attorney fees. Under these circumstances, we do not believe the trial court's award of attorney fees constituted an abuse of discretion.²

Plaintiff next argues that the trial court's award of attorney fees was improper because there was no evidence to support the reasonableness of the award. MCR 3.206 provides that only reasonable and necessary fees may be awarded. Plaintiff testified on direct examination that her counsel's fee was \$200 per hour, that she received and reviewed detailed monthly statements from her counsel, and that she believed the charges to be fair. An exhibit was entered at trial consisting of a statement of plaintiff's account up until the time of trial, and the last monthly statement received by plaintiff detailing her counsel's time and how it was spent. Defense counsel did not cross-examine plaintiff with respect to the reasonableness of the attorney fees, and presented no evidence or argument that the fees were unreasonable. Accordingly, we find no abuse of discretion in the trial court's award of attorney fees to plaintiff.

Defendant next argues that the trial court erred when it bifurcated the property issues from the child custody, support, and visitation issues. He contends that the bifurcation merely prolonged the proceedings, increased attorney fees, and made it more difficult for him to concentrate on developing his law practice. We find no grounds for reversal.

MCR 2.402(C) provides that, at a pretrial conference, the trial court and the attorneys for the parties may consider "any matters that will facilitate the fair and expeditious disposition of the action," including the separation of issues and other matters that may aid in the disposition of the action. MCR 2.402(C)(1)(f)(i). At a pretrial meeting of the parties in the judge's chambers to discuss the setting of a trial date, the guardian ad litem requested that the court bifurcate the proceedings because she believed

a custody trial at that time “would be detrimental to the healing process and counter-productive to the current progress being made.” In light of the guardian ad litem’s advice that the best interests of the children would be served by postponing the custody trial, we do not believe that the trial court erred in ordering a bifurcated trial.

Furthermore, we do not believe the bifurcation of the issues denied defendant due process of law. Due process is a flexible concept which applies to “any adjudication of important rights,” and calls for “such procedural protections as the particular situation demands.” *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995). Generally, in a civil case, due process requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. *Cummings v Wayne County*, 210 Mich App 249, 253; 533 NW2d 13 (1995). In the present case, contrary to plaintiff’s argument, the issues were not tried “piecemeal.” All property division issues were tried together during a three-day trial. After the property division, all custody, visitation, and child support issues were resolved by agreement of the parties. Defendant did not specify how the bifurcation denied him due process of law, other than to argue that the bifurcation resulted in increased attorney fees and caused him to be distracted from his law practice for a longer period of time than if the issues had all been tried together. We find no merit in these arguments.³

Defendant next argues that the trial court abused its discretion by awarding plaintiff certain real property. We disagree. When reviewing a property division, this Court must first review the trial court’s findings of fact under the clearly erroneous standard. *Sparks, supra* at 151. If the findings of fact are upheld, this Court must then decide whether the dispositive ruling was fair and equitable in light of those facts. *Id.* at 151-152. The dispositional ruling is discretionary and should be upheld unless this Court is left with a definite and firm conviction that the division was inequitable. *Id.* at 152.

Plaintiff testified that the real estate at issue consisted of eighteen acres on a lake in northern Wisconsin. Plaintiff’s further testified that her mother purchased the property in 1944 and that, over the last ten to twelve years, her mother signed a portion of the ownership of the property over to her in whatever increments were “allowed by the law each year without having to pay taxes on it.” Defendant does not dispute that this real property was plaintiff’s separate property.

MCL 552.23; MSA 25.103 provides that separate property may be distributed as part of the marital estate if the property in the marital estate is insufficient for the suitable support and maintenance of either party and the children of the marriage. The sale of the marital home satisfied the majority of the marital debts. While defendant’s personal debt placed him in a precarious financial situation temporarily, the trial court found that defendant had the ability to earn more than \$120,000 per year, while plaintiff had no means of support at the time of trial other than the alimony payments, and expected to earn a salary much lower than defendant’s in the future. We do not believe that these circumstances warranted an award of plaintiff’s separate property pursuant to MCL 552.23; MSA 25.103.

MCL 552.402; MSA 25.136 provides that a spouse’s personal property may be awarded to the other spouse if that spouse contributed to the acquisition, improvement, or accumulation of the property. In the instant case, other than a small investment of marital funds used to build a dock on the property, there was no testimony indicating that defendant contributed to the acquisition, improvement,

or accumulation of the property. Accordingly, we do not believe that the trial court's award of the Wisconsin property to plaintiff as her separate property was inequitable.

Docket No. 201133

Defendant argues that the trial court erred in denying his motion to modify the judgment of divorce with respect to his spousal and child support obligations due to changed circumstances. We agree in part.

An award of periodic alimony is subject to modification on a showing of changed circumstances arising since the divorce which justify a modification. MCL 552.28; MSA 25.106; *Ackerman, supra* at 301. The modification of an alimony award must be based on new facts or changed circumstances arising since the judgment of divorce and the party seeking the modification has the burden of showing changed circumstances meriting modification. *Id.* We review the trial court's findings of fact regarding the existence of a change in circumstances for clear error. A finding is clearly erroneous if this Court, on all the evidence present on the record, is left with a definite and firm conviction that a mistake has been made. Once this Court determines that the trial court's findings of fact are not clearly erroneous, we must decide whether the dispositional ruling is fair and equitable in light of those facts. *Id.* at 301-302. In this case, the trial court accepted defendant's allegations as true, and our only concern is whether the court's refusal to order modification of defendant's support obligations was fair and equitable.

At the time defendant filed his motion for modification of the divorce judgment, he had lost his job with a large law firm. He remained unemployed for several months,⁴ but eventually obtained full-time employment at a salary of \$120,000 per year. As the trial court recognized, his salary was paid bi-monthly at the rate of \$63,500 per year, and the balance of his salary was to be paid at the end of the law firm's fiscal year. Defendant essentially makes two different arguments. First, he argues that the manner in which his salary was paid necessitated a modification in his spousal support payments, and that the trial court's modification allowing \$1,000 monthly payment for six months, with a \$6,000 lump sum payment then due, was not sufficient. We reject this argument. While the terms of defendant's new employment reduced his monthly income, his yearly income remained the same. We do not believe that the change in the manner in which defendant received his income required any modification of defendant's alimony obligation beyond the six-month alteration ordered by the court.

Defendant's second argument bears closer scrutiny. He argues that the trial court erred when it refused to modify the divorce judgment based on his period of unemployment. Indeed, the trial court essentially dismissed defendant's period of unemployment as insignificant:

You know, really that happens in everybody's life. Everybody gets behind. He's going to get – I know he's not going to get \$60,000 in January, but he's going to get \$19,000. That makes up for the three months he wasn't working.

The problem I see in every time Mr. Hill comes to this Court is that, everybody else should get paid, except Mrs. Hill. And that's not what's going to happen. I'm not – I think the Friend of the Court's ruling is fair. I think it takes into consideration the

fact that he was unemployed for three and a half months. He's going to get money in January. He must pay her the money that she is owed.

The problem with the trial court's logic is that, while it claims to recognize defendant's unemployment, it effectively treats it as a non-event. Defendant apparently went several months without income, and yet the court would not grant any reduction in the total amount of defendant's support obligations during this time. Thus, defendant was forced to shoulder the entire cost of his unemployment. While such a result might be equitable in rare circumstances, such as where a party was voluntarily unemployed, we find nothing which justifies such a harsh result in this case. We do not suggest that defendant should have been relieved from all of his obligations during his unemployment. Instead, the trial court should have examined the reason for defendant's unemployment, and the length of unemployment, and then divided the burden equitably between the parties. Financial setbacks are often a part of marriage; when one spouse loses a job, both must endure the temporary and long-term financial hardships it may bring. Where, even after a divorce, one spouse continues to depend on the other for support, he or she is still subject to those uncertainties. In short, the trial court erred in not recognizing defendant's unemployment.

We also note that the fact that defendant was "going to get \$19,000" had nothing to do with his unemployment, and in no way made up for the income defendant lost during that time. Instead, the \$19,000 payment represented salary from defendant's new job. In effect, the trial court counted this money twice; first to justify defendant's ability to pay past-due support that accrued during his unemployment, and again to justify defendant's ability to maintain his future alimony payments. We remand for reconsideration of this issue, and instruct the trial court to divide the burden of defendant's unemployment equitably between the parties, taking into account the reason for the unemployment and the parties respective needs.⁵

Defendant next argues that the trial court should have granted his motion for modification of his child support obligation of \$200 per week due to the fact that one of his children turned eighteen years old in June, 1996, and the fact that another child resided with him from July, 1995 to September, 1996.

A trial court has the power to modify a child support order upon a showing by the petitioning party of a change in circumstances justifying modification. MCL 552.17; MSA 25.97. All relevant factors, including the child's needs and the parties' abilities to pay, must be considered in determining whether there was a sufficient change in circumstances to justify the modification. *Varga v Varga*, 173 Mich App 411, 416; 434 NW2d 152 (1988).

The amended judgment of divorce provided that defendant was required to pay child support of \$200 per week, "said payments to continue until the children reach the age of 18 years or the age of 19 ½ years of [sic] attending high school on a full time basis with the reasonable expectation of completing sufficient credits to graduate from high school, whichever is later, or until further order of the court." The child support provision did not address whether there should be a reduction as each child reached age eighteen, nor did it provide for a reduction when one of the children resided with defendant.

Here, the trial court correctly pointed out that one child was living with defendant at the time the custody issues were resolved. Thus, this living arrangement did not constitute a change in circumstances

justifying modification. Indeed, if the child is now living with plaintiff, plaintiff might argue that this change warrants an *increase* in child support. However, the trial court did not explain why the fact that one child had reached age eighteen did not constitute a change in circumstances warranting a modification of defendant's child support obligation. Instead, the trial court pointed out that the original support provision provided for weekly lump sum payments, rather than specifying an amount per child. Regardless of the original support provision, the trial court should have considered whether the amount of child support was still appropriate in light of the fact that a child had recently reached the age of majority. We remand for reconsideration of this issue.

Defendant also argues that the trial court erred in declining to hold an evidentiary hearing on the issues surrounding his motion for modification. We disagree. No factual issues material to defendant's motion were in dispute, since the trial court took defendant's claims regarding his income and expenses as true. Under these circumstances, the trial court properly declined to hold an evidentiary hearing on defendant's motion. *Varga, supra* at 415-416. We note, however, that the trial court may elect to hold an evidentiary on remand if it finds such a hearing necessary or appropriate.

Finally, defendant argues that the income withholding order provided for in the amended judgment of divorce violates MCL 552.608; MSA 25.164(8) because it orders the withholding of approximately 78% of defendant's net weekly pay. We disagree.

MCL 552.608; MSA 25.164(8) provides:

The total amount of income withheld under this act under all orders to withhold income for current support, past due support, fees, and health care coverage premiums effective against a payer shall not exceed the maximum amount permitted under section 303(b) of title III of the consumer credit protection act, Public Law 90-321, 15 U.S.C. 1673.

15 USC § 1673(b)(2) of the Consumer Credit Protection Act provides:

The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed –

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week; except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which

is prior to the twelve-week period which ends with the beginning of such workweek.

15 USC §1673(c) provides that “[n]o court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.” For the purposes of the Consumer Credit Protection Act, the term “earnings” is defined as “compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.” 15 USC §1672(a). Although plaintiff received bimonthly paychecks based on \$63,500 per year, his “earnings” were based on \$120,000 per year. The fact that the Consumer Credit Protection Act’s definition of “earnings” included compensation “paid or payable,” indicates that future payments for personal services rendered should be included in defendant’s “earnings.” Therefore, we find that the income withholding order does not violate MCL 552.608; MSA 25.164(8) and 15 USC §1673.

We recognize that the parties circumstances may well have changed again during the pendency of this appeal. When the trial court reconsiders defendant’s requests for modification of his support obligations on remand, it is free to consider any subsequent changes in fashioning an appropriate remedy.

Docket No. 194551: Affirmed.

Docket No. 201133: Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Myron H. Wahls

/s/ Roman S. Gribbs

¹ Even if plaintiff completes further education, she still expects to earn far less than defendant was earning at the time of trial.

² We note that plaintiff owned real property that potentially could have been used to pay her attorney fees. However, we do not believe that plaintiff was required to invade this property, given the parties’ disparate earning potential. See *Hanaway*, *supra* at 299.

³ We note that defendant requests that we reverse the judgment of divorce. We do not understand how such a reversal would remedy defendant’s alleged injuries. Rather, it seems that reversal would simply create more attorney fees and further prolong this litigation.

⁴ Defendant indicated that he lost his job on December 31, 1995, and began full-time employment again on September 1, 1996. However, his attorney suggested that he had “no income for three and a half months.” Thus, it seems that he was at least partially employed during the eight months between full-time jobs.

⁵ We stress that the court should take a flexible approach in reaching an equitable arrangement. For instance, the court could relieve defendant of most of his alimony obligations during his period of unemployment, but extend his alimony payments past the original three-year period.